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No. 83-455

In the Supreme Court of the United States

OCTOBER TERM, 198__

LARRY R. MEACHUM, DIRECTOR,
OKLAHOMA DEPARTMENT OF CORRECTIONS, ET AL.,
Petitioners,

vs.

BOBBY BATTLE, ET AL.,
Respondents,

and

UNITED STATES OF AMERICA,
Respondent/Intervenor.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether, in an 11-year-old prison conditions of confinement case, a federal district court may refuse to permanently allow double celling and may threaten to require a return to previously ordered single celling even while finding a State is currently double celling in a constitutional fashion.

2. Whether a federal district court may, consistent with limits on its Article III jurisdiction and its equitable powers, threaten to require a return to single celling, rather than constitutional operation of double celling, as a remedy for a perceived "deterioration" of prison conditions, although the court finds conditions presently constitutional.

PARTIES TO THE PROCEEDINGS

This is a class-action proceeding in which the Plaintiff class consists of all persons confined in the institutions of the Oklahoma Department of Corrections. The United States of America is a Respondent/Intervenor in the action. The Petitioners are the Director of the Oklahoma Department of Corrections, Larry R. Meachum, and the members of the Oklahoma Board of Corrections, William E. Beckman, James Dunham, Denny Hopkins, James A. Kirk, Leroy Kirk and William McLeod. In addition, the Warden of the Oklahoma State Penitentiary, John Brown, is a party to the action.

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No. .....

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VS.

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and

UNITED STATES OF AMERICA,
Respondent/Intervenor.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Petitioners (Defendants below), those officials of the State of Oklahoma charged with the management of the institutions of the Oklahoma Department of Corrections, seek a Writ of Certiorari to review the opinion of the United States Court of Appeals for the Tenth Circuit entered below. The case below was styled *Battle* v. *Anderson* and was decided in seven consolidated appeals on May 6, 1983.

OPINIONS AND ORDERS BELOW

The Opinion of the United States Court of Appeals for the Tenth Circuit is published as *Battle* v. *Anderson,* 708 F.2d 1523 (10th Cir. 1983). Certain relevant opinions and

orders of the United States District Court for the Eastern District of Oklahoma are unpublished but appear herein as Appendix "A" (Order of April 23, 1982), Appendix "B" (Order of September 28, 1982), and Appendix "C" (Memorandum Opinion of October 12, 1982). The Petitioners believe jurisdiction to hear this action is conferred upon this Court by 28 U.S.C. § 1254(1). The Opinion of the Court of Appeals for the Tenth Circuit was entered on May 6, 1983. The Court of Appeals denied a timely suggestion for rehearing en banc on June 6, 1983.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the Eighth Amendment to the United States Constitution, which states in its entirety:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

In addition, this action was brought under the provisions of 42 U.S.C. § 1983, which states in its entirety:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

STATEMENT OF THE CASE

The Petitioners are those officials charged with the management of the institutions of the Oklahoma Department of Corrections. They are defendants in the action below and will hereinafter be referred to as Defendants or the State of Oklahoma. This designation is for convenience only, and the Defendants in no way intimate that the State of Oklahoma is a party to this action.

In 1977 the District Court ordered that prison inmates housed in cells must be given 60 square feet of floor space apiece and that inmates being housed in dormitories be given 75 square feet apiece. The court found these space requirements to be the minimum permitted by the Constitution. *Battle* v. *Anderson*, 447 F.Supp. 516, 520 (E.D. Okl. 1977). Believing these space standards to be constitutionally required and desiring to end this litigation, the Defendants stipulated in January, 1981, to a number of standards including these space requirements. The practical result of the court's order and the later stipulation of the parties was to require single celling within the institutions of the Oklahoma prison system.

Later in 1981, this Court defined for the first time the meaning of the Eighth Amendment for conditions of confinement within prisons in the case of *Rhodes* v. *Chapman*, 452 U.S. 337 (1981), holding that double celling was permissible where it did not cause the wanton and unnecessary infliction of pain. In the latter part of 1981 and continuing through the present, the population in Oklahoma's prisons has increased considerably. As a result of these population increases, the Defendants asked the District Court for au-

thority temporarily, and later permanently, to double cell and double bunk within Oklahoma's prisons consistent with the constitutional standards announced in *Rhodes*. The court conducted evidentiary hearings on this issue in December, 1981, and in April and October, 1982.

On December 8, 1981, the Defendants filed a motion seeking temporary emergency authority to double cell at least 310 cells at four of Oklahoma's newest prisons as a result of a backlog of state inmates in county jails. This motion came on for hearing before the District Court on December 22, 1981. Between the time of the filing of the motion and the hearing thereon, the District Court ordered the Corrections Director, Larry R. Meachum, and members of the Board of Corrections to show cause why they should not be held in criminal contempt as a result of certain press statements regarding overcrowding made by the Director Meachum. No prosecutor was appointed to conduct the criminal contempt proceedings until the day of the hearing on the Defendants' motion for temporary and emergency authority to double cell, when the court appointed counsel for the United States of America, Mr. Paul Lawrence, to prosecute the criminal contempt proceedings (December Tr. 35). The court decided to put the criminal contempt proceeding "on the back burner" but stated it would consider evidence on the double celling motion as well in the criminal contempt proceeding (December Tr. 40).

The Honorable George Nigh, Governor of the State of Oklahoma, testified as to his efforts to comply with the court's orders. Governor Nigh testified that he would ask the Legislature for funding for 2,650 Department of Corrections employees for Fiscal Year 1983, which represented

an increase over the 1,214 employees of the Department in 1975 (December Tr. 22). The Governor pointed out that the State of Oklahoma was the first major correctional system to be fully accredited by the American Correctional Association (December Tr. 22). Governor Nigh testified that the Department of Corrections operations budget request for Fiscal Year 1983 would be over $70 Million (December Tr. 25). Although not appearing in the record at this stage, the initial budget appropriation, later increased by the Legislature, for Fiscal Year 1983 for the Department of Corrections was $81.1 Million. The Governor pointed out the sizeable increase in the budget for the Department of Corrections since 1975 when the operational budget for the Department was $11,961,000 (December Tr. 25). The Governor pointed out that capital expenditures for the Department of Corrections from 1975 through 1983, as recommended, would be $91,706,982 (December Tr. 25). Although not appearing in the record, the Department of Corrections budget for fiscal year 1984 approves 3,562 full-time equivalent staff members in an operational budget of $98.6 Million. Also, although not appearing in the record, two of Oklahoma's prisons, the Joseph Harp Correctional Center and the Lexington Correctional Center, in the summer of 1983 passed reaudit by the American Correctional Association with very high marks.

An official of the Department of Corrections then testified that there had been limited double celling as a result of overcrowding for two days at three different facilities. However, by the time of the hearing, there was no double celling within the Oklahoma Department of Corrections (December Tr. 42, 50-51). Thereafter, the Wardens of the

four prisons at which the Defendants proposed to double cell certain cells, testified at length regarding the quality of their facilities. They testified essentially that they could accept limited double celling without violating the Eighth Amendment or curtailing existing programs for inmates. The testimony of these Wardens was targeted to compare their facilities with the Southern Ohio Correctional Facility, which had been approved by this Court for double celling in *Rhodes* v. *Chapman* (December Tr. 60-206).

At the conclusion of the hearing, the court stated that the Defendants had permission for one year to double cell at the requested units, but that if they did so such double celling would be unconstitutional and the State of Oklahoma would be fined $1,000 per day for every day during which the Defendants double celled (December Tr. 326-30). The court further found that the case of "Chapman v. Rhodes" did not apply herein because the order in this case "was made somewhat by agreement of the parties" (December Tr. 326-30). The court specifically found that double celling causes homosexuality and stated that the court could not be a party to such illegal behavior (December Tr. 331). The court dismissed the criminal contempt proceedings after hearing the evidence for temporary emergency double celling. The court later stayed the $1,000 per day fine (December Tr. 334).

As a result of continued increases in inmate population, on April 6, 1982, the Defendants filed a motion for immediate and permanent modification of the court's orders prohibiting double celling. In that motion the Defendants asked for permanent authority to double cell Oklahoma's penal institutions consistent with this Court's decision in

Rhodes v. *Chapman*. This motion came on for hearing on April 23, 1982.

At the hearing on the permanent double celling motion, the Defendants admitted into evidence an affidavit of Superintendent Ronald C. Marshall of the Southern Ohio Correctional Facility (SOCF) at Lucasville, Ohio, the prison approved for double celling by This Court in *Rhodes* v. *Chapman*. This affidavit and the attached photographs compared SOCF with the Conner Correctional Center, the Lexington Correctional Center, the Joseph Harp Correctional Center and the Mabel Bassett Correctional Center in Oklahoma. Attached to this affidavit were affidavits of the then-Wardens of these Oklahoma prisons. Based upon personal inspection, Superintendent Marshall testified that these Oklahoma prisons met or exceeded the standards found in his own institution. See Defendants' Exhibit 2, admitted April Tr. 40. Superintendent Marshall gave live testimony at the April 23, 1982 hearing regarding his inspection of the remaining six Oklahoma institutions and photographs of those institutions were admitted into evidence (April Tr. 42-65). Superintendent Marshall testified in substance that Oklahoma's prisons were as good or better than the Southern Ohio Correctional Facility, which was the subject of *Rhodes* v. *Chapman*. Corrections Director Larry R. Meachum, testified after Superintendent Marshall that, if given authority to double cell consistent with constitutional standards, he would double cell new institutions first (April Tr. 58).

At the conclusion of the April 23, 1982 hearings, the court granted the Defendants indefinite, but not permanent, authority to double cell consistent with constitutional standards. See order of April 23, 1982, Appendix "A" hereto.

The court's action left the spectre that, at a later date, the Defendants might be ordered to return to single celling while double celling consistently with constitutional standards.

On September 29, 1982, as a result of a letter written by Corrections Director Larry R. Meachum, the District Court entered an order clarifying its previous orders and permitting the Defendants to double bunk in open bay dormitories consistent with constitutional standards. See Appendix "B" hereto. In reaction to this order, on Friday, October 1, 1982, the Plaintiffs served by hand, motions to stay and vacate the double bunking order and to place a population cap on Oklahoma's prisons. The court set these emergency motions for hearing on Monday, October 4, 1982. At that hearing, the court's Fact Finder served as Plaintiffs' expert witness in opposition to double bunking.

While the Defendants were informed that the Plaintiffs would be filing a motion, they did not have notice of the actual nature of that motion until it was filed by hand on October 1, 1982. Counsel for the Defendants was out of town on that day and did not read the motion until the next day, Saturday, October 2, 1982. The court had scheduled the hearing on Plaintiffs' Motion for Monday morning, October 4, 1982. At the time of the hearing the Defendants objected to hearing so important a motion on short notice and further objected to the hearing for reason that the District Court did not have jurisdiction to grant the relief sought in light of the then-pending appeals (October Tr. 18-19). After hearing the Plaintiffs' opening statement, the defense counsel had to ask leave of the court to make an opening statement on behalf of the Defendants; and the

court made it clear that it planned only to hear evidence during the morning of October 4 (October Tr. 18).

The court's Fact Finder, John Albach, served as Plaintiffs' expert witness during the hearing. The District Court would not permit the Defendants to question Plaintiffs' expert on the disproportionality of conditions within Oklahoma's prisons to the crimes for which the inmates had been convicted (October Tr. 76-77). The Defendants noted to the court that the disproportionality of conditions to crimes committed was one of the Eighth Amendment factors approved in *Rhodes* v. *Chapman* (October Tr. 77). *See, Rhodes,* 452 U.S. at 347. The trial court further would not permit the Defendants to question the Plaintiffs' expert on his disagreement with this Court's decision in *Rhodes* (October Tr. 87-88). However, in December, 1981, the court's Fact Finder had previously testified regarding his opposition to the *Rhodes* case (December Tr. 325). The Fact Finder's testimony regarding sanitary problems consisted of his own lay opinion of the cause of stomach flu during winter months unsupported by medical professionals or medical records (October Tr. 73-75). The Fact Finder did testify that he had no way to tell whether conditions in Oklahoma's prisons were disproportionate to the contemporary standards of public decency in Oklahoma because the Fact Finder is not an Oklahoma resident (October Tr. 78).

Corrections Director Larry Meachum testified that the Department was fully staffing the control rooms of its institutions with one correctional officer in each control room at all times. The Director further testified that the Department of Corrections would be able to continue this staffing

in the future (October Tr. 105-08). The Director also explained that he had approached the Contingency Review Board, consisting of the Governor, the Speaker of the State House of Representatives and the President Pro Tempore of the State Senate, to seek authority for 254 or 274 additional full-time equivalent employees (October Tr. 110). Director Meachum also testified that the Department was providing inmates with adequate food, clothing, medical care and sanitation. With additional work and assistance from the Contingency Review Board and Legislature, the Director testified, the Department could provide adequate security and programs (October Tr. 138-40). Director Meachum explained to the court steps which had been taken and which would continue to be taken to correct deficiencies in fire marshall reports at the McLeod Correctional Center, the Oklahoma State Penitentiary Trusty Building, the Oklahoma State Reformatory, the Ouachita Correctional Center and the Stringtown Correctional Center (October Tr. 101-04). Director Meachum testified that the Department had received an additional 43 full-time equivalent employees for programs and to combat inmate idleness (October Tr. 127-28). The Director also testified that the Department was considering permitting inmates from the minimum security unit at the Jess Dunn Correctional Center to become employed in the nearby City of Muskogee, Oklahoma. Further, the Department was considering permitting Jess Dunn inmates to attend vocational and technical school in Muskogee. Also, the Department was considering longer-range plans to permit inmates to work for the Department of Transportation or the State Department of Parks and Recreation (October Tr. 109). Director Meachum testified that roughly 3,000 inmates were then involved in programs, ex-

clusive of those inmates who were employed. He further testified that perhaps 5,000 inmates could be involved in programs by March, 1983, exclusive of those who worked (October Tr. 130-31).

Director Meachum further explained that the Department had changed its criteria for written serious incident reviews of the use of force within prisons or of inmate-inmate altercations. This changed criteria, rather than necessarily any additional use of force, accounted for the increased numbers of S.I.R. reports (October Tr. 132-33).

For the convenience of the Court, Judge Barrett's opinion below summarizes the factual record presented to the District Court. *Battle* v. *Anderson*, 708 F.2d 1523, 1530-36 (10th Cir. 1983).

Based on the 71 pages of testimony by the court's Fact Finder, the court found the entire Oklahoma prison system threatened to become unconstitutional once again. Based upon this finding, the court ordered the Defendants to prepare a plan to return to their single-celling stipulations even while finding the prison system to be presently constitutional. See Appendix "C" hereto.

All three members of the Court of Appeals panel hearing these consolidated appeals found conditions within the Oklahoma Department of Corrections to be constitutional within the meaning of *Rhodes* v. *Chapman*. *Battle*, supra, 708 F.2d at 1537. The panel majority held that the District Court should keep jurisdiction until it was assured that Eighth Amendment violations would not recur and stated that the focus of judicial inquiry was not particularized in discrete events, but rather social conditions which threaten important constitutional values and the organizational dy-

namics that create and perpetuate that condition. *Id.*, 708 F.2d at 1537-38. The panel majority went on to hold that the District Court's order requiring a plan of action describing measures to be used to avoid a return to unconstitutional prison conditions and a date of compliance with the single-celling stipulations was within the proper scope of the District Court's authority and affirmed that order in full. *Id.*, 708 F.2d at 1540. Thus, the Court of Appeals sanctioned a forced return to single celling as a remedy for possible future unconstitutionality of conditions while double celilng.

REASONS FOR GRANTING THE WRIT

THE COURT BELOW HAS DECIDED AN IMPORTANT CONSTITUTIONAL QUESTION IMPLICATING THE ARTICLE III JURISDICTION OF FEDERAL COURTS AND THE EQUITABLE LIMITS ON THEIR ACTION AND HAS SERIOUSLY UPSET THE PROPER BALANCE OF THE FEDERAL SYSTEM, ALL IN CONFLICT WITH DECISIONS OF THIS COURT.

Oklahoma is the first State in the Nation to have a prison system which is fully accredited by the American Correctional Association. Only the State of Utah, with a single institution, was accredited before Oklahoma. The District Court and all three members of the Court of Appeals panel hearing this case concede that conditions within the Oklahoma prison system are constitutional. Yet, these Defendants face the spectre of a court-ordered return to single celling despite their demonstrated ability to double cell Oklahoma's prisons constitutionally and consistent with rulings of this Court. Based upon its unfounded fear that

unconstitutional conditions threatened, the District Court ordered the Defendants to prepare to return to single celling. The Defendants believe the proper remedy for the perceived "deterioration" of conditions within Oklahoma's prisons while double celling is specific orders directed to those factors which might become unconstitutional rather than a blanket order to return to single celling while at the same time finding conditions to be constitutional.

To put this case in context, in October, 1982, after considerable double celling, the District Court still found Oklahoma's prisons to be constitutional, although in a state of "deterioration." Therefore, in its earlier single-celled condition ordered by the District court in 1977, the Oklahoma prison system was in a condition far above that actually required by the Constitution. It is this superior state that the district court sought to reimpose on the defendants, with the approval of the Court of Appeals. Although the District Court has yet to take that final step, it could do so at anytime and Defendants would only have recourse to this Court.

This case presents an important opportunity for this Court to outline the proper Article III jurisdiction of federal courts and the proper limits on their equitable powers in prison cases for the benefit of the Tenth Circuit Court of Appeals and other federal courts. The decision of the court below permits virtually unlimited discretion on the part of federal courts in continuing their remedial jurisdiction in prison cases even after constitutional conditions have been achieved in prisons. The proper limits on federal court involvement in prison litigation is important because over 30 states currently have some form of federal court

supervision over institutions within their prison systems. Such federal court supervision is relatively easy to achieve by demonstrating some condition which violates the constitutional rights of inmates. However, under the theory adopted by the court below, that federal court intervention will be very difficult to end because the court below sanctioned continued federal court supervision and use of extra-constitutional remedies even while conceding the State was operating its prison system in a constitutional fashion. This holding seriously disturbs the balance in the federal system as articulated by opinions of this Court. The balance of state and federal authority within the federal system is a question of national importance and is not limited merely to the rights and obligations of the parties to this action. This case is further important because it calls upon this Court to properly limit the discretion of the Federal District Court in ordering a return to single celling which could potentially cost the State of Oklahoma staggering sums of money even though the State of Oklahoma is operating its prison system with double celling in a constitutional fashion.

A. The Courts Below Have Exceeded the Limits of Their Article III Jurisdiction.

This Court has recently reaffirmed that a plaintiff must demonstrate a personal stake in the outcome of litigation in order to meet Article III requirements for federal court jurisdiction. In *Los Angeles* v. *Lyons*, ... U.S. ..... (1983), this Court stated:

> ". . . The plaintiff must show that he 'has sustained or is immediately in danger of sustaining some direct injury' as the result of the challenged official conduct

> and the injury or threat of injury must be both 'real and immediate', not 'conjectural' or 'hypothetical.' . . ." 75 L.Ed.2d at 684.

This Court has made clear that abstract injury is not enough to support Article III jurisdiction of federal courts because the plaintiff must allege that he has sustained or is immediaetly in danger of sustaining some direct injury as a result of the challenged conduct. *O'Shea* v. *Littleton,* 414 U.S. 488, 494 (1974). This Court has made clear that past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief, however, if unaccompanied by any continuing present adverse effects. *Id.,* 414 U.S., at 495-96.

This Court has announced the standard for constitutionality of prison conditions under the Eighth Amendment in the case of *Rhodes* v. *Chapman,* 452 U.S. 337 (1981). In that case this Court set the general standard for double celling and conditions of confinement as follows:

> "These principles apply when the conditions of confinement compose the punishment at issue. Conditions must not involve the wanton and unnecessary infliction of pain, nor may they be grossly disproportionate to the severity of the crime warranting imprisonment. . . . Conditions other than those in Gamble and Hutto, alone or in combination, may deprive inmates of the minimal civilized measure of life's necessities. Such conditions could be cruel and unusual under the contemporary standard of decency that we recognized in Gamble, 429 US, at 103-104. But conditions that cannot be said to be cruel and unusual under contemporary standards are not unconstitutional. To the extent that such conditions are restrictive and even harsh, they are part of the penalty that criminal offenders pay for their offenses against society." 452 U.S. at 347.

Thus, it is clear that only the wanton and unnecessary infliction of pain or a direct and immediate threat of the infliction of such pain justifies continued federal intervention in the operation of Oklahoma's prisons.

This Court has made it clear that federal courts should intervene in the day-to-day operation of state penal and detention systems only with the greatest of reluctance. *Procunier* v. *Martinez*, 416 U.S. 396, 404-05 (1974). Further, in seeking to define even in broad and general terms how far the remedial powers of federal courts extend, it is important to remember that judicial powers may be exercised only on the basis of a constitutional violation. *See, Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16 (1971); *United States* v. *Gregory-Portland Independent School District*, 654 F.2d 989, 1006 (5th Cir. 1981). Where no constitutional deprivation is established, the justification for federal judicial intervention evaporates. *Smith* v. *Sullivan*, 611 F.2d 1039, 1044-45 (5th Cir. 1980). While constitutional standards must be scrupulously observed,

> ". . . It does mean in the prison context that federal courts should keep their eyes on the main objective, the Eighth Amendment command for the eradication of cruel and unusual punishment. . . ." *Newman* v. *Alabama*, 559 F.2d 283, 287 (5th Cir. 1977).

Indeed, in the *Rhodes* case, supra, this Court was careful to state that in deciding questions involving the Eighth Amendment, courts must bear in mind that their inquiries spring from constitutional requirements and that judicial answers to them must reflect that fact rather than a court's idea of how best to operate a detention facility. *Rhodes*, supra, 452 U.S. at 351. In *Rhodes* the Court found there

was no constitutional violation. There being no constitutional violation, this Court held the district court *had no authority* to consider whether double celling was the best response to the increase in prison population. *Id.*, 452 U.S. at 351.

In another context, this Court has stated:

> ". . . Because of this inherent limitation upon federal judicial authority, federal-court decrees exceed appropriate limits if they are aimed at eliminating a condition that does not violate the Constitution or does not flow from such a violation, see Pasadena Bd. of Education v Spangler, 427 US 424 (1976) or if they are imposed upon governmental units that were neither involved in nor affected by the constitutional violation, as in Milliken I, supra. Hills v Gautreaux, 425 US 284, 292-296 (1976). . . ." *Milliken* v. *Bradley*, 433 U.S. 267, 282 (1977).

Likewise, this Court in the same year stated:

> ". . . The power of the federal courts to restructure the operation of local and state governmental entities 'is not plenary. It "may be exercised 'only on the basis of a constitutional violation.' " 418 US, at 738, quoting Swann v Charlotte-Mecklenburg Board of Education, 402 US 1, 16. Once a constitutional violation is found, a federal court is required to tailor 'the scope of the remedy' to fit 'the nature and extent of the constitutional violation.' 418 US, at 744, Swann, supra, at 16, Id., at 293-294. See also Austin Independent School Dist. v United States, 429 US 990, 991 (1976) (Powell, J., concurring)." *Dayton Board of Education* v. *Brinkman*, 433 U.S. 406, 419-20 (1977).

The Fifth Circuit recently recognized a similar principle in the case involving the Texas Department of Corrections. *See, Ruiz* v. *Estelle*, 679 F.2d 1115, 1145 (5th Cir. 1982) (the

nature of the violation determines the scope of the remedy). *See also, United States* v. *City of Parma, Ohio,* 661 F.2d 562, 576 (6th Cir. 1981), *cert. denied,* 456 U.S. 926 (1982); *Resident Advisory Board* v. *Rizzo,* 564 F.2d 126, 145 (3rd Cir. 1977); *Williams* v. *Edwards,* 547 F.2d 1206, 1211-12 (5th Cir. 1977).

If the Article III jurisdiction of federal courts is tied to remedying constitutional violations only, the court below has gone too far. The Defendants believe the District Court's condemnation of the entire Oklahoma prison system at a hearing held on three days' notice and based upon only 71 pages of transcript, was both unfair and factually unfounded. However, even taking at face value the District Court's factual finding that unconstitutional conditions once again threatened with the Defendants' system of double celling, the proper remedy tailored to the threatened constitutional violation would be to require the Defendants to take steps to assure that constitutional conditions under double celling could be maintained. The District Court erred in retaining authority to impose single celling upon the Defendants even though finding their operations constitutional in April, 1982. The District Court further erred in ordering them to prepare a plan to return to single celling although finding their operations still constitutional in October, 1982. The Court of Appeals seriously erred by affirming those orders based upon the District Court's finding of potential unconstitutional conditions in the future. The courts below exceeded their Article III jurisdiction by sanctioning the return to single celling as a response to potential constitutional violations in the future. Staking out that authority went far beyond tailoring the scope of the remedy to fit the nature and extent of a potential constitutional violation.

B. The Courts Below Have Exceeded the Equitable Limits Imposed on Federal Courts.

This Court has established certain equitable limits on the exercise of injunctive power by federal courts. Recently, in *Los Angeles* v. *Lyons*, supra, this Court stated:

> ". . . If Lyons has made no showing that he is realistically threatened by a repetition of his experience of October, 1976, then he has not met the requirements for seeking an injunction in a federal court, whether the injunction contemplates intrusive structural relief or the cessation of a discrete practice.
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> * * *
>
> ". . . The equitable doctrine that cessation of the challenged conduct does not bar an injunction is of little help in this respect, for Lyons' lack of standing does not rest on the termination of the police practice but on the speculative nature of his claim that he will again experience injury as the result of that practice even if continued." 75 L.Ed.2d at 688-89.

In the same case, this Court went on to state:

> "We decline the invitation to slight the preconditions for equitable relief; for as we have held, recognition of the need for a proper balance between state and federal authority counsels restraint in the issuance of injunctions against state officers engaged in the administration of the states' criminal laws in the absence of irreparable injury which is both great and immediate. O'Shea, 414 US, at 499, Younger v Harris, 401 US 37, 46 (1971). Mitchum v Foster, 407 US 225, (1972) held that suits brought under 42 USC § 1983 are exempt from the flat ban against the issuance of injunctions directed at state court proceedings, 28 USC § 2283. But this holding did not displace the normal principles of equity, comity and federalism that should

> inform the judgment of federal courts when asked to oversee state law enforcement authorities. In exercising their equitable powers federal courts must recognize '[t]he special delicacy of the adjustment to be preserved between federal equitable power and State administration of its own law.' Stefanelli v Minard, 342 US 117, 120 (1951); O'Shea v Littleton, 414 US, at 500. See also Rizzo v Goode, 423 US, at 380, Cleary v Bolger, 371 US 392 (1963); Wilson v. Schnettler, 365 US 381 (1961); Pugach v Dollinger, 365 US 458 (1961). The Court of Appeals failed to apply these factors properly and therefore erred in finding that the District Court had not abused its discretion in entering an injunction in this case." 75 L.Ed.2d at 690-91.

The Defendants concede that their predecessors once ran a prison system which was unconstitutional in some respects. However, that is no longer the case because, as both courts below recognized, the Oklahoma prison system is currently constitutional. The District Court's finding that unconstitutional conditions threatened, based upon 71 pages of transcript, is clearly erroneous, particularly in light of the rapid turn-abouts performed by the District Court in its factual findings. In December, 1981, the District Court found that double celling in Oklahoma's prisons would be unconstitutional, but it permitted the temporary double celling of 310 cells. Four months later, in April, 1982, after those 310 cells had been double celled, the District Court found that double celling in Oklahoma's prisons was constitutional. Six months after that, in October, 1982, the District Court found the prison system constitutional once again, but that unconstitutional conditions threatened based upon the testimony of its Fact Finder acting as Plaintiff's

expert witness testifying for 71 pages of transcript. The same Fact Finder is previously on the record under oath disagreeing with this Court's opinion in *Rhodes* v. *Chapman* (December Tr. 325). Interestingly enough, in the ten months which have transpired since the District Court's October hearing, the Plaintiffs have made no effort to seek emergency relief from the infliction of the unconstitutional conditions which they predicted in October. The Defendants urgently request this Court to review the factual record to determine whether or not the factual finding of impending unconstitutional conditions is a justified exercise of the discretion of the District Court.

Additionally, the Defendants believe the courts below have seriously erred because they have explicitly approved an ordered return to single celling in an action based upon 42 U.S.C. § 1983. This Court has stated of that statute in *Rizzo* v. *Goode*, 423 U.S. 362 (1976):

> ". . . The plain words of the statute impose liability — whether in the form of payment of redressive damages or being placed under an injunction — only for conduct which 'subjects, or causes to be subjected' the complainant to a deprivation of a right secured by the Constitution and laws." 423 U.S. at 371, 372.

However, footnote 5 to the majority opinion of the Court of Appeals explicitly recognizes that the Court of Appeals was sanctioning a return to single celling whose "provisions may be adjusted in the future in light of the totality of the circumstances without compromising constitutional standards." *Battle* v. *Anderson*, 708 F.2d 1523, 1540 (10th Cir. 1983) n.5. The Court of Appeals in the same footnote went on to state that, given the "declining" conditions in Oklahoma's prisons, although those conditions were not found to

be unconstitutional, it was proper to retain, for the present, the obligation of eventual single celling. *Id.*, 708 F.2d at 1540 at n.5. It appears quite clear that the Court of Appeals considered it proper to require single celling where prison conditions were less comfortable than they once were but where prison conditions were still constitutional. This is a clear-cut violation of the equitable authority of federal courts and is, further, beyond the statutory language of § 1983 as defined by this Court in *Rizzo* v. *Goode*, supra.

In a similar case dealing with the compliance phase of federal court remedial orders, this Court in *Pasadena City Board of Education* v. *Spangler*, 427 U.S. 424 (1976), held that a district court exceeded its authority in requiring an annual racial rebalance of public schools once a racially neutral attendance system had been established. *Id.*, 427 U.S. at 434, 435. This Court went on to state that the district court had fully performed its remedial function once the racially neutral attendance system was initially implemented and was not entitled to require the school board to annually rearrange its attendance zones to meet a fixed racial mixture. *Id.*, 427 U.S. at 436-37. This Court went on to state that the district court had abused its discretion in failing to modify its prior orders because of changed conditions of facts within the school system. This current round of litigation began in the District Court with attempts by the Defendants to secure modification of the District Court's single celling orders as a result of this Court's opinion in *Rhodes* v. *Chapman* and the increasing prison population in the State of Oklahoma.

In a case very similar to the one at hand, this Court permitted modification of a consent decree enjoining certain

labor practices. In *System Federation No. 91, Railway Employees' Department, AFL-CIO* v. *Wright*, 364 U.S. 642 (1961), the Court reversed the district court and Court of Appeals for abuse of discretion for failing to modify a consent decree against a union shop after the labor laws had changed to permit a union shop. The Court noted that in considering such requests the trial court must balance the policy of res judicata against the right of a litigant to apply for changed relief under changed conditions of law. *Id.*, 364 U.S. at 647-48. The Court went on to note that the parties cannot, by giving each other consideration, purchase a continuing injunction where that injunction has been an instrument of wrong. *Id.*, 364 U.S., at 651.

The Defendants believe that the District Court and the Court of Appeals abused their discretion in failing to modify the District Court's original single celling order to conform with this Court's ruling in *Rhodes* v. *Chapman* and in light of the increasing prison population in the State of Oklahoma. Failure of the courts below to require modification of the District Court's prior orders puts these Defendants in the position of being threatened with a requirement to single cell their prisons when such measures are not required by the Constitution and while they are operating under double celling in a constitutional fashion. The Defendants believe that these requirements exceed the proper equitable limits on injunctive authority of federal courts and disrupt the proper balance of authority between elected and appointed state officials and the federal judiciary.

C. The Courts Below Have Disrupted the Proper Balance of the Federal System.

This Court has clearly stated that corrections officials must be given the discretion and latitude to handle matters of correctional policy in the absence of a federal court finding of constitutional violations. *Hewitt* v. *Helms*, ... U.S. ....., 74 L.Ed.2d 675, 685-86 (1983); *Rhodes* v. *Chapman*, 452 U.S. 337, 349 (1981); *Bell* v. *Wolfish*, 441 U.S. 520, 547-48 (1979). This Court has counselled special restraint in the use of federal equitable power when courts are called upon to enjoin the operation of criminal justice systems. *Los Angeles* v. *Lyons*, ... U.S. ....., 75 L.Ed.2d 675, 691 (1983); *Rizzo* v. *Goode*, supra, 423 U.S. at 379; *O'Shea* v. *Littleton*, supra, 414 U.S. at 499. This Court most succinctly stated the principle as follows:

> ". . . But under the Constitution, the first question to be answered is not whose plan is best, but in what branch of Government is lodged the authority to initially devise the plan. This does not mean that constitutional rights are not to be scrupulously observed. It does mean, however, that the inquiry of federal courts into prison management must be limited to the issue of whether a particular system violates any prohibition of the Constitution, or in the case of a federal prison, a statute. The wide range of 'judgment calls' that meet constitutional and statutory requirements are confided to officials outside of the Judicial Branch of Government." *Bell* v. *Wolfish*, 441 U.S. at 562.

When the Court of Appeals sanctioned a forced return to single celling while simultaneously admitting that single celling requirements could be adjusted without compromising constitutional standards, the Court of Appeals entered

into the realm of "judgment calls" reserved by this Court to state officials. See *Battle* v. *Anderson*, 708 F.2d 1523, 1540 (10th Cir. 1983). Adopting for itself the authority to make those "judgment calls" disrupted the proper balance of the federal system in violation of this Court's clear holdings to the contrary.

D. The Importance of Review of This Case.

If the court below had merely made an erroneous interpretation of law or fact, the Defendants would not ask this Court to review it. However, the court below has erred in its opinion in a way which is so fundamentally at variance with the rulings of this Court and in a way which has such wide-spread implications for these parties and for over 30 States, that review and reversal is necessary to correct the errors below. Therefore, these Defendants believe that review by this Court is imperative.

It is important for this Court to return the Court of Appeals to the proper boundaries of Article III jurisdiction and to the proper exercise of the federal courts' equitable injunctive authority. There is no case or controversy within the meaning of Article III where there is no constitutional violation present. Nor is there any claim under 42 U.S.C. § 1983 because that statute only applies to situations in which a person is being deprived of a constitutional right under color of state law. Both the District Court and the Court of Appeals have conceded that conditions within Oklahoma's prisons are constitutional. Since the hurried and abbreviated hearing before the Distirct Court in October, 1982, the Plaintiffs have sought no relief in the District Court alleging current unconstitutional conditions. There-

fore, this Court should discount their dire predictions of unconstitutionality made in October of last year.

Because the Defendants are operating the prison system under a regime of double celling within constitutional limits, the Plaintiffs have no standing to demand single celling because they are suffering no present, real and immediate constitutional injury. The Court of Appeals ruling explicitly sanctions continued stringent federal court intervention in the operation of Oklahoma's prisons by permitting the forced return to single celling while simultaneously admitting that double celling does not compromise constitutional standards. *Battle* v. *Anderson*, 708 F.2d 1523, 1540 (10th Cir. 1983) n.5. This ruling of the Circuit can only serve to distort the course of constitutional litigation in the five States comprising the Tenth Circuit. The profound effect of the Court of Appeals ruling will, therefore, be felt far beyond the relations between the parties to this action. It is vitally important for this Court to articulate the standards for termination of federal court jurisdiction in prison litigation because over 30 states have at least part of their prison systems under some form of federal court order. These various orders seek to remedy constitutional violations within prisons in their respective states. These orders are entered relatively easily under 42 U.S.C. § 1983 because of the relative ease of proving at least *some* constitutional right has been violated under color of state law within any given prison system. However, there is relatively little authority on what is required to terminate or limit federal court jurisdiction over prison systems once constitutional compliance is achieved. As these various states achieve the remedial objectives of federal courts, both the courts and

the parties need guidance on what is necessary to end or limit federal court jurisdiction over prison systems. After 11 years of litigation and over $400 Million in capital and operational spending for prisons in the State of Oklahoma and after full accreditation by the American Correctional Association, it would seem that the Defendants herein should easily be permitted to double cell consistent with this Court's opinion in *Rhodes* v. *Chapman*. However, that is not the case under the opinion of the Court of Appeals. If the opinion of the court below is adopted by federal courts in other states and Circuits, courts everywhere will struggle with the question of exactly what level of constitutional compliance is required for what period of time in order to justify a cessation of federal court control.

It is important for this Court to redress the proper balance in the federal system which is disrupted by the opinion of the court below. This Court has clearly stated that federal courts cannot assume state legislatures and prison officials are insensitive to the requirements of the Constitution or to the perplexing sociological problems of how best to achieve the goals of the penal function in the criminal justice system. *Rhodes* v. *Chapman,* 452 U.S. at 352. Indeed, the Oklahoma Legislature and the Oklahoma Department of Corrections have built a model correctional system which continues to be accredited by the American Correctional Association. It can harly be said that officials of the State of Oklahoma, including the Governor who testified before the District Court, are insensitive to the requirements of the Constitution. Yet, the courts below have imposed their judgment of what is required for running a prison system on the Defendants even while the Defendants

are operating the Oklahoma prison system in a constitutional fashion. The courts below have deprived the Oklahoma Legislature, the State's Governor and Oklahoma correctional officials of the authority to make necessary and legitimate "judgment calls" based upon a mere fear of possible future unconstitutionality based upon a mere 71 pages of transcript testimony taken at a hearing called on three days' notice. The actions of the courts below have caused a substantial portion of the legitimate functions of state government in Oklahoma to be transferred to the virtually unrestricted discretion of the District Court. That court now has authority to order a return to single celling even though no unconstitutional conditions exist within the Oklahoma prison system.

Federal court intervention is appropriate in state affairs where state democratic processes fail to protect the rights of some segment of the population. The Defendants concede that at the inception of this lawsuit conditions within some of Oklahoma's prisons were unconstitutional. However, since that time, and partially as a result of the actions of the District Court herein, Oklahoma has built one of the finest prison systems in the nation. The Oklahoma prison system is conceded to be constitutional by both the District Court and the Court of Appeals. Having done so, the authority to manage that prison system should shift from the federal courts back to the properly constituted authorities of the State of Oklahoma. These authorities should be permitted to double cell Oklahoma's prisons within the meaning of this Court's opinion in *Rhodes* v. *Chapman* without federal court intervention because such intervention is a remedy for the default of state officials and is not a substitute for proper democratic state government.

Beyond the implications for the federal system nationwide found in the Court of Appeals' opinion, the resolution of this question is important to the parties to this action and to the State of Oklahoma. As noted above, footnote 5 to the majority opinion of the Court of Appeals essentially gives the District Court unrestricted discretion to require single celling even where such single celling is clearly not required by the Constitution. See *Battle* v. *Anderson*, 708 F.2d 1523, 1540 (10th Cir. 1983). Therefore, the District Court could require the staggeringly expensive remedy of single celling where there is no violation of a cognizable constitutional right of the Plaintiff class. To put this in perspective, a modern 400-cell prison similar to the Joseph Harp Correctional Center would cost $25-30 Million to build at current prices, including the cost of land acquisition. In *Ruiz* v. *Estelle*, 679 F.2d 1115, 1146 (5th Cir. 1982), the Fifth Circuit found that newly built maximum security prison cells cost between $30,000 and $60,000 apiece. If the Defendants are required to build an additional 1,200 cells to accommodate inmates currently double celled, the cost could therefore run into tens if not hundreds of millions of dollars. Even less expensive methods of construction are staggeringly expensive. Given the current state of affairs in state finance both in Oklahoma and throughout the Nation, a requirement to single cell in excess of constitutional standards could cripple state economies.

The District Court herein began the *Battle* litigation before this Court's decisions in *Bell* v. *Wolfish*, *Rhodes* v. *Chapman* and *Hewitt* v. *Helms* were handed down. In many respects, this case is one of the earliest forerunners of modern prison litigation. The District Court was forced

to find its own way in many of its rulings without definitive appellate court guidance. As a result, the Defendants herein live under District Court decrees which in many respects are far more liberal and intrusive than could be sanctioned under pertinent Supreme Court rulings. It is essential for the Defendants and for the State of Oklahoma that this Court grant certiorari and reverse the rulings of the courts below in order to modify the outdated rulings and excessively broad interpretations of federal court jurisdiction and equitable powers embodied in the rulings of the courts below.

CONCLUSION

For the reasons stated above, a Writ of Certiorari should be granted to review the judgment of the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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August, 1983

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

[Filed April 23, 1982]

BOBBY BATTLE, et al., a Class Action, Plaintiffs, and	)	
UNITED STATES OF AMERICA, Plaintiff-Intervenor, v.	)	No. 72-95-C
PARK ANDERSON, et al., Defendants.	)	

ORDER

Now on this 23rd day of April, 1982, this matter comes on for hearing on Defendants' Motion for Immediate and Permanent Relief from Prohibition Against Double-Celling. Plaintiffs are represented by their attorneys of record, Louis W. Bullock and Carl Stevens. Mr. John Green, Assistant United States Attorney, appears for Plaintiff-Intervenor, United States of America. Defendants are represented by Assistant Attorneys General Robert A. Nance, Charles S. Rogers, and John E. Douglas. Oklahoma Department of Corrections staff counsel Michael Avant-Pybas is also present. After taking evidence and hearing argument of counsel and being advised of the premises, the Court makes the following findings of fact, conclusions of law, and order.

1. The Court finds and holds that the Defendants should have and do hereby have the authority indefinitely but not permanently to double-cell where necessary. This Court's Order of January 12, 1982, is hereby vacated in part to permit indefinite double-celling throughout the Oklahoma Department of Corrections consistent with constitutional requirements. The Court's previous order setting a

limit of 500 inmates per institution is also hereby vacated. Therefore, Defendants' Motion is sustained to the extent of permitting indefinite double-celling, but overruled to the extent of denying permanent double-celling.

Exceptions to all parties. So ordered this 23rd day of April, 1982.

(s) *Luther Bohanon*
LUTHER BOHANON
United States District Judge

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APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

[Filed September 28, 1982]

BOBBY BATTLE, et al., Plaintiffs,	)	
and	)	
UNITED STATES OF AMERICA, Plaintiff-Intervenor,	)	
vs.	)	No. 72-95-CIV
PARK ANDERSON; LARRY MEACHUM, DIRECTOR, DEPT. OF CORRECTIONS; BOARD OF CORRECTIONS FOR THE STATE OF OKLAHOMA and Members Thereof, et al., Defendants.	)	

MODIFICATION OF DORMITORY REQUIREMENTS

This court received a request on July 20, 1982, from the Oklahoma Department of Corrections to specifically modify certain remedial orders requiring the housing of inmates in a space of at least seventy-five (75) square feet if housed in dormitories. Plaintiffs responded to this request on July 28, 1982, by emphatically opposing such measures based on the objections of security, privacy, disease, and lack of sufficient evidence to justify such relief.

On September 23, 1982, the impartial fact finder, John Albach, responded to a court request for his views on this issue in light of recent compliance inspections. He concluded that the safe execution of increasing the dormitory population is unproven due to the severe pressures on the system at this time. He further projected that the granting of this relief "could put the system back almost where it was in 1973."

[APPENDIX]

On September 27, 1982, the Department of Corrections in a letter from Director Larry R. Meachum explained the current need for relief and requested court action.

Therefore, the court after consideration of all views presented by the parties and in light of the evidence presented, hereby finds and orders that the defendants have the authority to increase the dormitory population where necessary and where it can be accomplished within constitutional requirements for an indefinite period.

Exceptions taken by all parties continue.

Dated this 28th day of September, 1982.

(s) *Luther Bohanon*
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

[Filed October 12, 1982]

BOBBY BATTLE, et al., Plaintiffs, and UNITED STATES OF AMERICA, Plaintiff-Intervenor, vs. PARK ANDERSON; LARRY MEACHUM, DIRECTOR, DEPT. OF CORRECTIONS; BOARD OF CORRECTIONS FOR THE STATE OF OKLAHOMA and Members Thereof, et al., Defendants.	)	No. 72-95-CIV

MEMORANDUM OPINION AND ORDER ON MOTIONS TO STAY AND ENJOIN FURTHER POPULATION INCREASE

Plaintiffs' motion to stay implementation of the court's order as to double bunking dated September 27, 1982, came on for hearing on October 4, 1982. Plaintiffs' concurrent emergency motion for the enjoining of further population increases in the Oklahoma prison system was also considered. The plaintiff class was represented by Louis W. Bullock. Defendants were represented by Assistant Attorney General Robert Nance for the State of Oklahoma and Michael Avant-Pybas as counsel for the Oklahoma Department of Corrections.

Wherefore, plaintiffs' motion to stay and enjoin further population increases having come on for consideration and the court having reviewed the evidence presented, authority cited, and being otherwise fully advised of the premises, finds the motions are not well taken and should be denied.

Motion to Stay

The argument that must be advanced by the plaintiff to succeed in the issuance of a stay must be structured on the following factors:

1. Harm to the petitioner
2. Harm to the respondent
3. Harm to the public interest; and
4. Likelihood of success of petitioner on the merits, *National Indian Youth Council* v. *Andrus*, 623 F.2d 694 (10th Cir. 1980); *Battle* v. *Anderson*, 564 F.2d 383 (10th Cir. 1977).

The court will organize the opinion following those four guideline considerations. However, a preliminary issue must be addressed before proceeding with this analysis.

The plaintiffs propound the argument that the District Court has an obligation to supervise implementation of adjudicated remedial action and a failure to strictly enforce established remedial measures would in effect violate the "Law of the case." The plaintiffs argue in their motion that the injunction heretofore issued should not be modified absent a showing that the injunctive relief has been altered by circumstances so that it is now an instrument of wrong. No authority was cited for this position, but the argument is similar to language used by the Supreme Court in *United States* v. *Swift & Company*, 286 U.S. 106 (1932). If the court is correct in interpreting the nature of this argument as one based on the general principles of the *Swift & Company* case, then the position advanced has no merit. A similar argument was unpersuasively advanced in *Nelson* v. *Collins*, 659 F.2d 420, 423 (4th Cir. 1981), a case factually similar to the one before this court. The *Nelson* court determined that in situations where the prison population increased at an unprecedented rate and where the remedial orders were issued prior to the specific guidance furnished

by the Supreme Court in *Bell* v. *Wolfish*, 441 U.S. 520 (1979) and subsequently in *Rhodes* v. *Chapman*, 452 U.S. 337 (1981), the necessary elements were present to permit modification of a "continuing decree . . . directed to events to come . . . [involving] the supervision of changing conduct or conditions." 659 F.2d at 424.[1]

The Tenth Circuit has implicitly approved this analysis when it permitted earlier modification of the *Battle* remedial orders on January 21, 1982.

Therefore, this court has the equitable power to modify the previous orders of this case. However, the orders have only been modified with respect to *time of compliance*. No permanent modification has ever been granted in this action. The court has been careful to use the term indefinite relief due to the recognition that the standard applicable to this case is that characterized by the "totality of circumstances." While *Rhodes* stands for the proposition that populations in excess of the rated capacity cannot be declared *per se* unconstitutional; neither can any set ratio be declared absolutely constitutional.[2] Thus, the determination of constitutional conditions must inherently involve a continuing review of population figures, as one of the multiple relevant factors.[3] The court must stand ready to act should any factor causally swing the balance of the totality of the circumstances past the line separating constitutional from unconstitutional conditions.[4]

Harm to the Petitioner

The harm to the plaintiff class if the stay is not granted could be significant. The court's appointed fact finder testified as a plaintiff witness that (1) the prison system was severely understaffed; (2) it posed significant fire safety dangers; and (3) as recently as days before the hearing of October 4 the system had significant sanitation problems. This testimony was based on recent compliance inspection tours conducted at this court's direction. The most alarm-

ing testimony clearly showed dental, physical, and mental health deficiencies. The fact finder, Mr. John Albach, concluded that in his opinion the prison system had crossed the threshold of unconstitutional conditions given the totality of the circumstances.[5] To permit the addition of more prisoners to such existing prison conditions would seem (to Mr. Albach) only to exacerbate the problems.

While the court would not conclude from the evidence presented that the system has become unconstitutional in its operation, the system is clearly in the state of rapid decline. The system has slipped into the twilight of constitutional compliance and could well slip into its previous unconstitutional condition. Thus the harm that the plaintiffs could suffer is real and potentially significant.

However, the defendants mitigated the impressive factual evidence of the plaintiffs with state officials' sworn assurances of increased staffing, current upgrading of fire standards, and legislative approval of stop-gap spending until the next scheduled legislative assembly. Those significant factors would indeed mitigate the harm suffered by the plaintiff class to an insignificant level. But to remain insignificant, the remedial effects of these measures must be carefully monitored.

Initially this critical monitoring process will consist of the forthcoming Final Compliance Report of Mr. Albach. However, in addition to the recommendations and observations now being compiled in that report, the court directs the fact finder to include suggested reporting techniques that will ensure detailed public statistical information on penal system conditions. While not limited to the below enumerated subjects, the report shall include data for each institution instantaneously depicting the current status of (1) security; (2) medical service availability; (3) mental health service availability; (4) population statistics (*see Ruiz* v. *Estelle*, 666 F.2d 854, 863 (5th Cir. 1982), and (5) outstanding Fire Marshal deficiencies.

Harm to the Respondent

The defendants have the unenviable position of being saddled with the problems of population increases with no resources at its disposal to alleviate the overcrowding. As *Rhodes* noted, "at least three factors influence prison population: the number of arrests, prosecution policies, and sentencing and parole decisions." 452 U.S. at 350 (note 15). These three factors are beyond the control of the defendants of this case.

Nevertheless, while the position of the prison officials is a difficult one in the face of bulging prison populations; the harm suffered by staying specific relief would be measured primarily in administrative difficulties. While the benefit as to administrative flexibility of double bunking the dormitories is great, the actual harm to be suffered in the denial of this option is insignificant. A gratifying benefit of dormitory double bunking is the avoidance of housing state prisoners in poorly equipped and over-populated county jails. Double bunking is certainly better for the housing of the unfortunate.

Harm to the Public Interest

As stated by this court previously and noted by the Court of Appeals in its opinion; "[where the public interests lie] is never an easy question to resolve. It is especially difficult in this type of case, where the plaintiffs' class are generally a feared and despised class." *Battle* v. *Anderson*, 564 F.2d 388, 398 (10th Cir. 1977). However, since the testimony was largely that the prison population is unlikely to become collectively violent due to the order allowing dormitory double bunking, the balance of the public interest must lie in the possibilities for rehabilitation in this relief. The administrative flexibility in placing more inmates in the minimum and medium security institutions by way of dormitory population increases leads to greater rehabilitation possibilities when compared to the alternative

of housing at a higher level of security. This alternative also furthers the continuing penological goal of separation of violent and passive inmates.

The public interest is also against excessive intervention of the federal courts in the administration, control, and maintenance by the state sovereigns of their prison systems. Where as here, the unprecedented growth rate is outstripping good faith attempts at remedial legislation the the state must first be given the opportunity to exercise their ability to correct the situation without judicial interference unless the system is allowed to deteriorate to an unconstitutional level.

In keeping with this policy of sovereign state action, defendants are directed to submit an official penal system policy for the state and a plan of action designed to immediately stop the deterioration of the system to unconstitutional levels. This policy statement and plan of action shall be developed within a reasonable time after the reconvening of the legislature but in any case, no later than May 1, 1983.

Likelihood of the Success of the Petitioner on the Merits

The political climate of the country accurately reflects the legal trend in this country in prison litigation. The chambers opinion of *Atiyeh* v. *Capps*, 449 U.S. 1312 (1981) accurately reflects this situation. After quoting from the District Court's conclusions that

> "overcrowding . . . has increased the health risks to which inmates are exposed; has impinged on the proper delivery of medical and mental health care; has reduced the opportunity for inmates to participate in rehabilitative programs; has resulted in idleness; has produced an atmosphere of tension and fear among inmates and staff; has reduced the ability of the institutions to protect the inmates from assaults; and

> is likely to produce embittered citizens with heightened anti-social attitudes and behavior. 495 F.Supp., at 813"

the Justice made the following comment:

> "In short, nobody promised them a rose garden; and I know of nothing in the Eighth Amendment which requires that they be housed in a manner most pleasing to them, or considered even by most knowledgeable penal authorities to be likely to avoid confrontations, psychological depression, and the like. They have been convicted of crime, and there is nothing in the Constitution which forbids their being penalized as a result of that conviction." 449 U.S. at 1315.

On its face, the Justice would seem to be rejecting the concept of prisoner rights and unconstitutional prison conditions, but as evidenced in *Atiyeh* and the later opinion of *Rhodes* the actual quarrel is with the *sufficiency* of the showing of unconstitutional conditions. The applicable legal standard demands strong empirical evidence upon which to base a conclusion of unconstitutionality. No longer will the mere opinion of an expert be sufficient upon which to base such a finding. Noting the difficulty of factual determination of prison conditions, this court, by agreement of the parties, appointed a fact finder to compile detailed empirical evidence of Oklahoma prison conditions. The fact finder is currently compiling a full report and the court's continued emphasis on statistical public reporting will allow all parties to monitor the conditions of confinement in the Oklahoma prison system.

However, the court does not believe that the evidence presented to date shows a totality of conditions mandating a finding of unconstitutionality. The evidence is clear that this may not be the situation in the near future due to the deterioration of conditions in the penal system but upon the facts now before the court the plaintiff class would seem to the court to have little likelihood of a success on the

merits absent additional statistical evidence. The Eighth Amendment does not forbid prison conditions amounting to punishment of the inmates. The protection it affords is directed against "cruel and unusual" punishment. While Oklahoma's current conditions certainly amount to punishment (albeit harsh), the evidence does not indicate that the level can be fairly classified as "cruel and unusual."

Enjoining Further Population Increases

The issue of whether the court has the jurisdictional power to grant this relief due to the nature of the appeals now pending before the court of appeals need not be reached. In view of the court's ruling above as to the current constitutional operation of the Oklahoma prison system, the court lacks the foundational evidence upon which to issue an injunction against further population increases.

ORDER

WHEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that plaintiffs' motion to vacate or stay this court's order of September 27, 1982, be, and the same hereby is, denied.

IT IS FURTHER ORDERED that plaintiffs' emergency motion for the enjoining of further population increases in the Oklahoma prison system be, and the same hereby is, denied.

Although not required, pursuant to Rule 52(a) of the Federal Rules of Civil Procedure, the above memorandum shall be adopted in lieu of separate findings of fact and conclusions of law and accordingly the court summarizes the incorporated remedial directives in the order below.

Wherefore, the court having this day entered findings of fact and conclusions of law;

IT IS ORDERED that the fact finder shall file with the Clerk of the Court not later than December 1, 1982, a

suggested quarterly reporting procedure that will conform to the guidance issued by the court this day.

IT IS FURTHER ORDERED that the defendants shall file with the Clerk of the Court an official statement of penal policy and detailed plan of action describing measures that will be used to avoid the return of the Oklahoma prison system to unconstitutional conditions and date of compliance with the agreed to stipulations of January 22, 1981. These documents shall be filed within a reasonable time upon the reconvening of the Oklahoma Legislature but not later than May 1, 1983.

The Clerk is requested to mail copies of this Order to all counsel of record.

Dated this *12th* day of October, 1982.

(s) *Luther Bohanon*
UNITED STATES DISTRICT JUDGE

FOOTNOTES

[1] *See also* II Wright & Miller, *Federal Practice and Procedure*, §2961, pp 604-605 (1973).

[2] While the full extent of the holding of *Rhodes* v. *Chapman* is unclear, it is generally agreed among the courts of appeals that the totality of the circumstances test is the present Eighth Amendment standard. *See Stewart* v. *Winter*, 669 F.2d 328, 335 (5th Cir. 1982).

[3] The plaintiffs raised the issue in their written motion that this court "was without jurisdiction to enter the Order [regarding double bunking] since the issue of overcrowding is currently on appeal." However, this characterization is in error. The only relevant issue on appeal is whether the defendants have an absolute constitutional right to adjust populations in their prisons regardless of court approval. Whether this position is upheld on review or rejected, the decision would have no effect on the order herein at issue. The issue now before this court goes

to the nature of relief this court may grant, not the minimum constitutional standards applicable to prison population.

Action by the Court of Appeals can do no more than liberalize the standards imposed on the state corrections system by this court, and a delay in discharging the duty to modify remedial orders upon change of conditions and law would result in unwarranted administrative interference.

[4] In the Tenth Circuit order issued January 21, 1982, in this case, the court directed the striking of a similar statement. The stricken statement read: "The court finds that when conditions of confinement amount to cruel and unusual punishment, the court shall discharge its duty to protect prisoners' constitutional rights." No guidance was issued as to the reason for this statement deletion from the district court order. This court is of the opinion that the statement was disapproved in context and not in substance. The statement could have been interpreted to be a threat. The statement issued on the heels of a finding of unconstitutional conditions might well have been misunderstood as an invitation to disaster.

This court continues of the opinion that the standard to be used in issuing remedial orders in prison cases is that of constitutional violation resulting in cruel and unusual punishment. As Justice Rehnquist stated in *Atiyeh* v. *Capps*, 449 U.S. 1312, 1318 (1981), "there is likewise no reason for the District Court to stay its hand when specific constitutional violations are called to its attention."

[5] Mr. Albach also testified to serious deficiencies in the exercise, work, food and recreation programs. He additionally noted significant incidences of self mutilations, suicides, and other evidences of severe stress on the system.